No. 91-471

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
*Petitioner,*
v.
GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; and JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,
*Respondents.*

**On Writ of Certiorari to the Supreme Court of Alabama**

## BRIEF OF AMICI CURIAE HAZARDOUS WASTE TREATMENT COUNCIL AND THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONER

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March 12, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTION PRESENTED

Whether the State of Alabama may discriminate against interstate commerce by placing a $72.00 per ton "Additional Fee" on hazardous waste generated *outside* that state, disposed of within the state.

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### INTEREST OF *AMICI CURIAE*

The Hazardous Waste Treatment Council ("Treatment Council") is a national not-for-profit trade association having more than 60 member firms with operations in forty-eight states.[1] Its members serve thousands of large and small customers in those states, providing services, equipment and technology for the treatment, storage, recycling and disposal of hazardous waste generated by industry and agriculture. The services provided by Treat-

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[1] Petitioner Chemical Waste Management, Inc. ("CWM") is not a member of the Treatment Council.

ment Council members encompass the full range of hazardous waste management techniques, using both established and emerging technologies. These include incineration and other forms of thermal destruction, reclamation, biological and chemical treatment, land disposal after pretreatment, and hazardous site cleanups.[2] Treatment Council members depend upon Petitioner's Emelle, Alabama disposal facility in various ways, and are directly affected by the Alabama legislation at issue here.

The National Solid Waste Management Association ("NSWMA") is a not-for-profit trade association with a membership composed of companies in the waste management business. NSWMA consists of over 2,700 members whose activities encompass the entire spectrum of waste management services.[3] Pursuant to its bylaws, NSWMA is charged with protecting the interests of the waste management industry in the public and regulatory arena.[4] In particular, a fundamental goal of NSWMA's advocacy program, as approved by its Board of Directors, is "to insure adequate waste management capacity in North America." Members of NSWMA are engaged in the business of transporting and disposing of hazardous waste in Alabama and in other states. Several of NSWMA's members, including Petitioner, have transported hazardous waste into Alabama for disposal within that state.

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[2] The Treatment Council's Articles of Incorporation provide that among its purposes is:

> To promote the protection of the environment through the adoption of environmentally sound procedures and methods of destroying and treating hazardous wastes and the proper management of residues.

[3] Petitioner CWM is a member of NSWMA.

[4] The By-Laws of NSWMA direct it to:

> assist governments, public agencies and private organizations in the development, refinement and . . . acceptance of new and approved practices and policies, including laws and regulations in the waste management field . . . .



The Alabama legislation at issue here has a direct and adverse impact on the waste transportation, treatment or disposal activities of these members.

By erecting a "barrier at the border" to the flow of commerce into the state, the tariff on imports at issue here limits the ability of members of both the Treatment Council and NSWMA to make efficient use of the Nation's limited resources for waste treatment and disposal.[5]

## STATEMENT

*Amici* adopt petitioner's statement of the case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly 200 years, it has been understood that the national union which is the United States is, in part, an economic union, premised upon free trade between and among the citizens, businesses, farmers and industries of the various constituent states. The companies that are engaged in the important business of treating and disposing of the waste products generated by business, industry and agriculture in every state are a vital element of that national economic union.

For reasons of economy, efficiency and environmental protection, hazardous waste is frequently transported across state boundaries.[6] Economies of scale, market forces, geologic and other advantages naturally affect the

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[5] The parties' letters of consent have been filed with the Clerk pursuant to this Court's Rule 37.3.

[6] Because of the multitude of hazardous wastes produced in our society, no single technology can treat or dispose of *every* type of waste. As a result, if waste is to be disposed of properly, the shipment of waste across state borders is efficient and necessary. *See generally National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Envtl. Mgt.*, 910 F.2d 713, 717 (11th Cir. 1990), *modified on other grounds*, 924 F.2d 1001 (11th Cir.), *cert. denied*, 111 S. Ct. 2800 (1991); *see also Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991).

location and choice of hazardous waste treatment and disposal facilities, including the dispersion of facilities among the states. *No* single state—including Alabama—possesses within its borders the means to treat and dispose of *every* type of hazardous waste that its own residents and industry generate.[7] It is ordinarily far less costly—and more desirable for safety reasons—to move hazardous waste to the nearest, most technically advanced and safest disposal facility *across state lines*, than it is to transport waste greater distances within the same state in which it was generated. As the market has developed, therefore, hazardous waste regularly crosses state lines to take advantage of a competitive and efficient national market in the provision of treatment and disposal services.[8] With

[7] A 1989 study prepared for the U.S. Environmental Protection Agency analyzed waste management "flow" in the South-Central states (which includes Alabama). That comprehensive study demonstrated that: (1) no single state in that region has within its borders sufficient "capacity" to treat and dispose of *all* types of hazardous waste; and (2) hazardous waste flows both *out of* and *into* each of those states. For example, because Alabama does not have an "aqueous treatment" facility, industry located in that state must arrange for aqueous wastes to be shipped to Tennessee or some other state for proper treatment and disposal. *See National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Envtl. Mgt.*, 910 F.2d at 717 n.5; *see also Generation and Capacity: A Profile of Hazardous Waste Management in EPA Region IV* (Feb. 1989).

[8] Data provided to the U.S. Environmental Protection Agency by each state, pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 9604(c)(9) (1988) (discussed below), demonstrates that the national market for the treatment and disposal of hazardous waste is *necessarily* integrated and interdependent because: (1) every state has agriculture and industry which *generate* a variety of such wastes; (2) EPA has established extensive treatment standards for *hundreds* of types of hazardous waste and hazardous waste mixtures; (3) there are approximately 19 different treatment *technologies* available to accommodate the health and safety requirements unique to such wastes; (4) the *capital costs* for constructing and operating such technologies are high; and (5) as noted above, no single state has within its borders the full range or necessary *capacity* to treat and/or dispose of every type of waste. Thus, businesses and citizens located in almost every single state both export *and* import some hazardous waste for treatment and disposal. *See Interchange of Hazardous Waste Management Services Among States*, Environmental Information, Ltd. (Dec. 1990).



respect to the treatment and disposal of hazardous waste, the states—or, more precisely, the businesses, industries, farms and citizens located in each state—truly are, and should be, interdependent.

The existence of a national market meets a very particular national need. As noted above, interstate transportation is necessary because it is not economically efficient or feasible to build treatment and disposal facilities capable of dealing with every type of waste in every state.[9] Moreover, an open national market, in which the providers of services have access to potential customers throughout the nation, contributes to the development of innovative technologies and advanced facilities that can best deal with the growing national problem of hazardous waste. Technological development and capital investment —vital to meeting the uniformly acknowledged national need for increased capacity for safe treatment and disposal—are restrained by imposing artificial, political limits on the markets that any particular facility is permitted to serve.[10] The tariff at issue here creates precisely that type of limit.

More immediately, the tariff effectively deprives the citizens and businesses of other states of a resource—like other treatment and disposal services offered by amici—now urgently needed to dispose of certain types

[9] For example, Petitioner's disposal facility at Emelle, Alabama (which is the subject of this case), is one of only two facilities east of the Mississippi River that are permitted (under federal safety standards) to accept hazardous waste containing polychlorinated biphenyls ("PCBs").

[10] *See, e.g.*, 42 U.S.C. § 6902(a) (1988); H.R. Rep. No. 1133, 98th Cong., 2d Sess. 80 (1984); 129 Cong. Rec. H8896-97 (daily ed. Oct. 31, 1983).

of waste. At a time when the nation vitally needs cost-effective outlets for disposal and treatment of its waste products, Alabama has elected to artificially price such services for *imported* waste out of the reach of most potential users of the Emelle facility. In the short term, this tariff effectively will price out of the market a facility vital to the safe and efficient disposal of hazardous waste, an action which will lead to the increased illegal and unsafe "dumping" of hazardous waste.

Specifically, Alabama has enacted a tariff that imposes a $72.00 per ton "Additional Fee" on waste imported into that state for safe treatment and disposal. By imposing this discriminatory tax—which concededly is designed to limit out-of-state customers' use of Petitioner's Emelle disposal facility—Alabama seeks "to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). As discussed below, Alabama's effort to impose this barrier at its border strikes at the heart of the Commerce Clause, which prohibits any state from placing its parochial interests above those of the national union by discriminating against and restricting the flow of interstate commerce. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989).

Unfortunately, this is not the first of Alabama's initiatives in this field to come before the federal courts. For example, in 1988, Alabama filed suit against the United States Environmental Protection Agency ("EPA") to halt the cleanup of an abandoned hazardous waste site in Texas because the waste was to be disposed of at the Emelle facility. *See Alabama v. United States EPA*, 871 F.2d 1548 (11th Cir.), *cert. denied*, 431 U.S. 991 (1989). Although it dismissed the case on standing and jurisdictional grounds, the Eleventh Circuit noted that "[t]o the extent plaintiffs . . . assert injury based on the out-of-state nature of these wastes, the Supreme Court has already held that the commerce clause bars such a distinction." *Id.* at 1555 n.3 (citing *Philadelphia v. New Jersey*, 437 U.S. 617). Alabama next attempted, in 1989, to restrict the movement of waste in interstate commerce by enacting Ala. Act No. 89-788 (the "Holley Bill") (codified at Ala. Code § 22-30-11(b)). That law barred any commercial hazardous waste disposal facility located in Alabama (*i.e.*, Petitioner's Emelle facility) from treating or disposing of hazardous waste generated outside Alabama if the state in which the waste was generated did not satisfy certain criteria specified by Alabama. This blacklisting law, which "distinguishe[d] among wastes based on their origin, with no other basis for the distinction," was held to violate the Commerce Clause. *National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Envtl. Mgt.*, 910 F.2d 713, 720 (11th Cir. 1990).



Having been rebuffed twice, Alabama next set up a restriction on the import of wastes by use of a tariff[11] that might only be challenged in the state courts.[12] Nonetheless, the state trial court held that "the Additional Fee facially discriminates against waste generated in States other than Alabama," Appendix to Petition for Certiorari 85a, and following the principles announced by this Court, struck down the tariff under the Commerce Clause. The Alabama Supreme Court, however, reversed, concluding that the Additional Fee was constitutional.

The decision of the Alabama Supreme Court was wrong. Under the long-standing jurisprudence of this court, the unconstitutionality of the discriminatory "Additional Fee" is both patent and unjustified. Indeed, Alabama's tariff on out-of-state waste represents the type of naked discrimination against the shipment of goods into a state that this Court repeatedly has ruled is "virtually *per se*"

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[11] Ala. Act No. 90-326 (1990) (codified at Ala. Code § 22-30B-1.1 *et seq.*).

[12] Pursuant to the Tax Injunction Act, 28 U.S.C. § 1341 (1988), constitutional cases challenging state tax laws ordinarily are brought in the state courts.

invalid under the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. at 624. Of course, Alabama (like any other state) always is free to adopt and implement *bona fide* health and safety regulations to ensure proper treatment and disposal of these wastes. But the discrimination embodied in the $72.00 Additional Fee cannot be justified by any legitimate local purpose that *only* can be served by discriminating against interstate commerce.

Amici submit that this Court should not only reject the Additional Fee, but do so in the clearest possible terms. While nearly everyone recognizes the urgent need to safely manage hazardous waste, and to create facilities for that purpose, everyone likewise appears to prefer that the waste be treated and disposed of, and the facilities constructed, in some *other* state. Thus, Alabama's effort to bar the entry of these wastes reflects a "syndrome," sometimes referred to as "NIMBY" ("not in my backyard"), widely associated with the treatment and disposal of hazardous waste. Because a vote against the importation of *out-of-state* waste is an exceptionally easy vote for a state lawmaker to cast—there being no significant constituency *within* the state to protect the "out-of-staters"—there always exists the temptation to enact these kinds of laws. That temptation is magnified when other states pass similar laws because every time a state closes *its* borders to the importation of waste, it shifts the burden to other states to find some means of treating or disposing of those wastes. This, in turn, impels those states to retaliate.

Under the regime established by this Court's Commerce Clause jurisprudence, however, individual states are not in the business of correcting and regulating perceived imbalances in the flow of interstate commerce. If any legislative body is to "interfere" with such commerce, that body is Congress as the representative of the *national* interest. As shown below, the circumstances presented by this case demonstrate that recourse to Congress,



and several federal statutes, rather than self-help, is the only permissible route for a state believing itself "injured" by the flow of commerce from other states. Under the federal regulatory regime, federal regulators have both the authority and the obligation to redress the "imbalances" about which Alabama complains.

## ARGUMENT

### I. THE $72.00 ADDITIONAL FEE IS A *PER SE* VIOLATION OF THE COMMERCE CLAUSE BECAUSE IT FACIALLY DISCRIMINATES AGAINST INTERSTATE COMMERCE

This Court has held that the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) reflects:

> a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

*Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). This provision thus ensures "that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States." *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 8 (1986); *see also Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446 (1827); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224-25 (1824) (Johnson, J., concurring).

The creation of a single national market went hand-in-hand with the establishment of a national political union. When Alexander Hamilton posed the question: "what inducements could the States have, if disunited, to make war upon each other?" (*The Federalist* No. 7, at 60 (Mentor ed., 1961)), his answer, in part, was that:

> Competitions of Commerce would be [a] fruitful source of contention . . . . Each State, or separate

> confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. . . . The infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars.

*Id.* at 62-63. *See also Federalist* No. 6, at 54 (listing "rivalships and competitions of commerce" among "[t]he causes of hostility among nations"). Hamilton expanded on this concern in *Federalist* No. 22, explaining that:

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, *if not restrained by a national control*, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

*Id.* at 144-45 (emphasis added). Similarly, James Madison identified the Commerce Clause among the powers "which provide for the harmony and proper intercourse among the States," explaining that leaving regulation of commerce to individual states "would nourish unceasing animosities, and not improperly terminate in serious interruptions of the public tranquility." *Federalist* No. 42, at 267, 268.[13]

[13] Madison argued that "it is very certain that [the Commerce Clause] grew out of the abuse of the power by the importing States in *taxing* the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves." 3 *The Records of the Federal Convention of 1787*, at 478 (M. Farrand ed., 1937) (letter from J. Madison to J.C. Cabell, Feb. 13, 1829) (emphasis added). *See also id.* at 547-48 (Madison's Convention notes indicating that "want of a general power over Commerce . . . engendered rival, conflicting and angry regulations"). *See also Federalist* No. 22, at 144 (Hamilton explaining that the absence of federal supervision over commerce "has already operated as a bar to the formation of beneficial treaties with foreign powers, and has given occasions of dissatisfaction between the States.")



In sum, discrimination against, and state regulation of, interstate commerce were seen as a source of disharmony and discord working against the establishment of a strong and cohesive national union. Over the last 200 years, the *absence* of economic warfare between the states (and, but for the Civil War, the relative harmony of the Union) is a testament to this Court's early decisions vesting the federal judiciary with the "national control" necessary to keep the states from themselves engaging in the direct and discriminatory regulation of interstate commerce, preserving that sphere of activity exclusively to Congress.[14]

### A. The Alabama Tariff Is *Per Se* Invalid Because It Discriminates Against Out-Of-State Waste Solely On The Basis Of Its Origin

Under the Commerce Clause, no state is permitted to discriminate against interstate commerce. *See generally Healy*, 491 U.S. 324; *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988); *Maine v. Taylor*, 477 U.S. 131 (1986); *Hughes v. Oklahoma*, 441 U.S. 322. As a result, state laws that discriminate against interstate commerce are "routinely" held invalid. *New Energy*, 486 U.S. at 274. The cases of this Court are clear that state laws drawing distinctions among articles of commerce "based solely on its origin" are subject to a "'virtually *per se* rule of invalidity.'" *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992) (quoting *Philadelphia v. New Jer-*

[14] This Court long has held that the Constitution precludes certain forms of state regulation. *See, e.g., Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851) ("[w]hatever subjects of this [commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress"); *see also Leisy v. Hardin*, 135 U.S. 100, 109-10 (1890); *Gibbons*, 22 U.S. (9 Wheat.) at 209.

*sey*, 437 U.S. at 624); *see also Hughes v. Oklahoma*, 441 U.S. at 337 (facial discrimination by itself may be a fatal defect). Such laws "will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 112 S. Ct. at 800 (citation omitted); *see also Healy*, 491 U.S. at 337 n.14; *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 790.

The Alabama tariff on out-of-state waste is precisely the type of law that historically has been subjected to a "virtually *per se*" rule of invalidity. By its terms, the $72.00 per ton "Additional Fee" places a tariff on *all imported* waste shipped to Petitioner's Emelle, Alabama disposal facility from its out-of-state customers, but exempts *any* similar waste generated by Petitioner's *Alabama-based* customers. Thus, the legislation on its face, offers a preference to in-state economic interests at the expense of out-of-state interests. This is precisely what is meant by "economic protectionism" under this Court's cases.

In *Philadelphia v. New Jersey*, this Court dispelled any doubt whether there exists some implied exception to the principle barring state discrimination against out-of-state goods and services as it relates to the shipment of waste products. In that case, New Jersey sought to limit the flow of waste into the state, arguing that (1) the treatment and disposal of solid waste posed threats to the state's environment and the "limited natural resources" available for disposal in the state; and (2) the available landfill capacity within its borders was threatened by the treatment and disposal of waste originating both from within the state and from out-of-state sources. Notwithstanding the asserted health and safety purpose of New Jersey's law, this Court held that:

> it does not matter whether the ultimate aim of [the law] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State *unless there is some reason, apart from their origin, to treat them differently.*



437 U.S. at 626-27 (emphasis added).

By applying the $72.00 per ton "additional fee" solely to "imported" waste, Alabama, like New Jersey, has "discriminat[ed] against articles of commerce coming from outside the State." *Id.* It has done so at the expense of the citizens of the many other states who seek to use, and do business with, the Emelle facility. That Alabama has employed its *taxing* power to accomplish this goal does not, in any way, diminish the nature of the discrimination or take this case outside the rule of *Philadelphia v. New Jersey*. Taxation—especially taxation at a rate expressly intended to discourage certain business activity—can be the vehicle for the most virulent forms of discrimination. *See New Energy*, 486 U.S. 269; *Welton v. Missouri*, 91 U.S. 275 (1875). It has long been established that "no State can, consistently with the Federal Constitution, impose upon the products of other States . . . more onerous public burdens or taxes than it imposes upon the like products of its own territory." *Guy v. City of Baltimore*, 100 U.S. 434, 439 (1879).

As noted above, Alabama may not discriminate against out-of-state goods "unless there is some reason, apart from their origin, to treat them differently." *Philadelphia v. New Jersey*, 437 U.S. at 627. Respondents have been unable to identify any basis, other than state of origin, for discriminating against waste coming from outside of Alabama. Specifically, no legal justification for Alabama's

discrimination can be based on the character of the hazardous wastes which cross its borders. As found by the trial court in this case, wastes shipped *to* the Emelle facility from outside Alabama—metals, solvents, oil, chemicals, and other waste—are no different from those generated *within* the state. Pet. App. 84a-86a.[15] *See also Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 788 ("hazardous wastes generated out-of-state pose no more threat to human health and the environment than hazardous waste generated" in state); *National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Envtl. Mgt.*, 910 F.2d at 720. In the absence of such a distinction, any effort to discriminate against out-of-state waste *solely* because it is from out-of-state customers must fail. *See Philadelphia v. New Jersey*, 437 U.S. at 629 ("there is no basis to distinguish out-of-state waste from domestic waste"). Nonetheless, despite the virtual *per se* rule of invalidity established by this Court, the Alabama Supreme Court sustained the Additional Fee, brushing aside the statute's facial discrimination against interstate commerce on the theory that Alabama had met its burden of justifying such patent discrimination.

The Alabama Supreme Court appears to have reasoned as follows: *First*, it attempted to remove the Additional Fee from the ambit of established Commerce Clause jurisprudence on the basis of the presumed health and safety objectives of the Alabama legislature. Pet. App. 41a-46a. *Second*, the Alabama Supreme Court transformed the constitutional prohibition on discrimination against interstate commerce into a prohibition on discrimination *motivated* by the State's desire to provide *economic* benefits to local industry, finding the source of this principle in this Court's admonition that the Commerce Clause applies most forcefully to "economic protectionism." Pet. App. 38a-46a. Because the Additional Fee purportedly involved "health," not "economics," the Alabama Supreme Court reasoned that there was no constitutional violation and upheld the State's $72.00 tariff.

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[15] The Alabama appellate court did not take issue with the express finding by the trial court that there was no relevant distinction between waste generated within Alabama and waste generated in other states. As found by the trial court, "hazardous waste generated in Alabama is just as dangerous as such waste generated in other states." Pet. App. 86a. *See also Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 791. Thus, this Court's observation in *Philadelphia v. New Jersey* seems particularly apt:

> There is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter.

437 U.S. at 629.



As shown below, Alabama's argument fails for two related reasons. *First*, the distinction drawn by the Alabama appellate court ignores the clear holding of *Philadelphia v. New Jersey*, where this Court struck down the New Jersey law despite that state's presumably legitimate health and safety justifications. However, whatever the "ultimate purpose [of the law], it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Philadelphia v. New Jersey*, 437 U.S. at 626-27. The "virtually" *per se* rule of invalidity applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade. . . ." *Maine v. Taylor*, 477 U.S. at 148 n.19; *see also New Energy*, 486 U.S. at 279 n.3 (public health purpose will not validate "patent discrimination against interstate commerce").

*Second*, as *Philadelphia v. New Jersey* teaches, the form of "economic protectionism" prohibited by the Commerce Clause is not focused on the state legislature's overriding motive for acting in a particular field. Whether the state chooses to act in the area of health and safety,

taxation, wages and hours, economic regulation, or banking, the focus is not on the general provenance of the law, but on the rationale *for the discrimination against commerce*. As this Court has reaffirmed, it is "the *discrimination* [that must be] demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy*, 486 U.S. at 274 (emphasis added). In other words, there must be something different about the out-of-state goods —aside from their state of origin—that justifies the discrimination. Where there is no difference between the in-state and out-of-state goods, then there is, by definition, "economic protectionism" in the preference given "in-staters" over "out-of-staters." *Philadelphia v. New Jersey*, 437 U.S. at 626.

### B. Alabama Cannot Justify Its Discrimination Against Out-Of-State Waste

When a state law discriminates against interstate commerce either on its face or in its practical effect, the "burden falls on [the state] 'to justify both [the law] in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives.'" *Wyoming v. Oklahoma*, 112 S. Ct. at 801 (quoting *Hughes v. Oklahoma*, 441 U.S. at 336 and *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)). "'At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.'" *Wyoming v. Oklahoma*, 112 S. Ct. at 801 (quoting *Hughes v. Oklahoma*, 441 U.S. at 337).

As shown below, Alabama cannot meet the heavy burden of demonstrating that its tariff serves a legitimate local purpose that cannot adequately be served through reasonable "nondiscriminatory alternatives."



#### 1. *The Additional Fee Does Not Serve A Legitimate Local Purpose*

Although Alabama has sought to justify its Additional Fee as a health measure, the statute on its face does not take that form. The law is phrased not in terms of health or safety, but as a tax—indeed, a facially discriminatory tax—designed to serve as an "economic disincentive" [16] to the movement of waste into the State. Significantly, importers of waste who are financially prepared to "pay the freight" are free to bring waste into the State irrespective of the asserted safety or health concerns. It therefore is clear that the law is less a health and safety measure than a naked effort to discourage the import of waste, out of a general sense that Alabama is bearing a disproportionate share of the national market for waste disposal. Of course, the purpose to discriminate cannot meet the required *legitimate* local purpose standard.

Suffice it to say that Alabama has not put forward any "local concern" that distinguishes Alabama's situation from that of any other state that might, just as legitimately, assert similarly broad health and safety rationales. *See generally Maine v. Taylor*, 477 U.S. 131 (upholding Maine's prohibition on importing live baitfish because of the potential for destruction of Maine's unique fisheries). In considering the legitimacy of any asserted local purpose, this Court should be skeptical of a state interest so broadly drawn that it might be advanced with equal force by *any* state seeking to justify discrimination against commerce. To allow such generic justifications to sustain facially discriminatory laws would be to allow precisely the type of economic warfare that the Commerce Clause was intended to prevent. The local purpose to be sustained must be sufficiently particularized so that it

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[16] *See* Brief of Respondent Sizemore and the Alabama Department of Revenue In Opposition to Petition for Certiorari at 13-14.

truly requires some unique and carefully considered response from the state enacting the discriminatory legislation. There is little room under the Constitution for each state, in addressing a common problem, to implement a policy of "every state for itself," if to do so means attempting to isolate the state from its sister states. This is because:

> The entire Constitution "was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

*Healy*, 491 U.S. at 336 n.12 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). Here, Alabama has chosen to advance its local interests by insulating itself from a national problem, shared by *all* the states, in a distinctly discriminatory manner.

There is no need, however, to decide in this case whether the Additional Fee reflects a "legitimate" state interest. As shown below, it is clear that whether or not there is a legitimate purpose here, even a "presumably legitimate goal" cannot be advanced by " 'the illegitimate means of isolating the State from the national economy,' " *Wyoming v. Oklahoma*, 112 S. Ct. at 801 (quoting *Philadelphia v. New Jersey*, 437 U.S. at 627).

### 2. *There Are Nondiscriminatory Alternatives Available To Those States That Believe They Are "Dumping Grounds" For Waste*

Alabama cannot sustain its heavy burden of showing the *absence* of nondiscriminatory alternatives to accomplish its presumably legitimate goals. Any concern for the health and safety of its citizens arising from the disposal of hazardous waste can be and is currently met through health or safety standards *provided that such requirements apply evenhandedly* and *do not discriminate on the basis of state of origin. See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 792. Indeed, if the State primarily is interested in health and



welfare, any justification for applying strict standards to out-of-state wastes would apply *a fortiori* to identical wastes generated within the State.

In fact, the treatment and disposal regulations in place in Alabama and elsewhere, enacted pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, assure that all hazardous waste is disposed of in an environmentally sound and safe manner.[17] In addition to promulgating neutral health and safety standards, Alabama might legitimately enact a rationally-based, *nondiscriminatory* fee to be imposed on *all* waste generators seeking to use Alabama facilities, in-state and out-of-state generators alike. If such a fee would fall equally on *Alabama* businesses as well as "out-of-staters," it would provide assurance that such a law was the product of a considered public policy of sufficient force and importance that the State was willing to apply it to its *own* businesses and citizens, not merely to outsiders. That same assurance is not provided when the state targets outsiders to bear the brunt of its health and safety concerns.

At the heart of this matter, however, is Alabama's central perception that certain other states are not bearing their "fair share" of hazardous waste treatment and disposal. Alabama traces this "fair share" problem to a failure on the part of other states to create, or allow the creation of, disposal and treatment facilities within their borders. Alabama's Additional Fee—like Alabama's earlier rejected efforts, and the efforts of other states similarly rejected by the federal courts—appears to be designed to rectify this perceived imbalance by placing pressures on other states to "create" treatment and dis-

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[17] *See Alabama v. United States EPA*, 871 F.2d at 1552 ("The regulations promulgated pursuant to [RCRA] ensure that facilities disposing of hazardous wastes do so in a manner consistent with eliminating health and environmental risks caused by the hazardous wastes") (citation omitted).

posal facilities. Alabama thus seeks to achieve a "fair" allocation of waste disposal through self-help, through a financial disincentive which discourages the flow of waste into the State.

No principle of proportionality or "fair allocation" is built into the Commerce Clause. To the contrary, the Commerce Clause presumptively establishes allocation according to national market forces. It is to be expected that the unequal distribution of resources, innovations and other advantages among the states invariably will lead to imbalance and diversity, with some states excelling in certain industries and lagging behind in others.

Alabama remains free, within certain constitutional limits, indirectly to influence the allocation of hazardous wastes or other goods among and between the states through a host of nondiscriminatory means. A state "clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place." *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J. concurring). A state may regulate its economy and ensure the health of its citizens through rules of general application. But a state may not seek to legislate against some other state or states, or to regulate *directly* the import or export of interstate commerce. That is solely the responsibility of Congress under the Commerce Clause.

This case well illustrates the respective roles of the states and the federal government regarding the flow of commerce and the "fair allocation" of the burdens of membership in the national union—at least as respects hazardous waste. Fulfilling its constitutional responsibilities, Congress has established federal regulatory authorities and made various procedures available to the states to rectify precisely the kinds of imbalances about



which Alabama complains. To be sure, the federal program [18] prescribes that the preferred approach to the national problem of hazardous waste management remains in *open* state boundaries, *consistent* state health and safety regulations, a *nationwide* market, and *incentives* to encourage states to permit the construction of much-needed, technologically advanced facilities across the country. Nonetheless, any state that believes it is unfairly the victim of another state's failure to meet its environmental obligations may seek several forms of relief.

First, Alabama, South Carolina or any other state that believes it bears an "unfair burden" may petition the Federal Government to have a "recalcitrant" state's RCRA authority withdrawn.[19] A state to which EPA has delegated RCRA authority—to oversee the permitting and

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[18] The federal program includes the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6991, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and the Superfund Amendment and Reauthorization Act ("CERCLA" and "SARA"), (the "Superfund" statutes), 42 U.S.C. §§ 9601-9675, and the Hazardous Materials Transportation Uniform Safety Act ("HMTUSA"), 49 U.S.C. App. §§ 1801-1819. RCRA addresses the *management* aspects of treating and disposing of solid wastes; CERCLA and SARA the *cleanup* of abandoned or mismanaged substances and wastes; and HMTUSA the safe *transportation* of hazardous wastes.

[19] *See* 42 U.S.C. § 6926(e) ("the Administrator shall withdraw authorization of such program and establish a Federal program"). In recognition of the need for a hazardous waste management program that is "national in scope and concern," Congress enacted RCRA in 1976, 42 U.S.C. § 6901, a law which "attempts to address hazardous waste before it becomes a problem." *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 783. RCRA provides a mechanism for directly regulating the health and safety aspects of hazardous waste treatment and disposal through the creation of mandatory standards. While EPA retains overall authority to administer this national program, participating states, after submission of a program acceptable to EPA, may implement

regulation of hazardous waste facilities, generators and transporters—may have that authority withdrawn by EPA if its program is not "consistent with" the federal program. 42 U.S.C. § 6926(b). Significantly, EPA has made clear that a state RCRA program is "inconsistent" if it "unreasonably restricts, impedes, or operates as a ban on the free movement across the state border of hazardous waste." 40 C.F.R. § 271.4(a) (1991). If, as Alabama and South Carolina contend, other states have failed to carry their "fair share" of the hazardous waste problem—refusing to allow construction of new or expanded facilities because of the NIMBY syndrome—then EPA may withdraw the RCRA authority of these states. *See generally Hazardous Waste Treatment Council v. Reilly, Administrator of EPA*, 938 F.2d 1390 (D.C. Cir. 1991).

*Second*, Alabama separately can petition EPA to deny Superfund money [20] to a state that refuses to allow new

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their own waste management programs "in lieu of the federal program . . . in such State" so long as it is "equivalent to" and "consistent with" EPA regulations. 42 U.S.C. § 6926(b). An approved state RCRA program may contain health and safety criteria "more stringent" than the federal technical requirements. 42 U.S.C. § 6929. Congress also enacted the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Pub. L. No. 98-616, establishing national land disposal restrictions which require that hazardous wastes be treated by using the "best demonstrated available technology" before the waste can be land-disposed.

Significantly, in applying for and receiving authority for its *intrastate* program, Alabama necessarily agreed to meet EPA "consistency" requirements, including the requirement that it not use its authority in a way that "unreasonably restricts, impedes or operates as a ban on the interstate movement of hazardous waste." 40 C.F.R. § 271.4(a).

[20] In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the initial "Superfund" statute. 42 U.S.C. §§ 9601-9675. CERCLA created a fund of federal monies available to states to be used for "response"



facilities to be built in that state, pursuant to CERCLA § 104(c)(9),[21] a step which South Carolina recently took

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actions—the cleanup of hazardous substances which had been released into the environment in a manner that is harmful to the public health and welfare of the environment. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 783.

[21] Section 104(c)(9) of CERCLA (42 U.S.C. § 9604(c)(9)) requires each state that seeks Superfund assistance to provide assurances that it has moved to create disposal and treatment capacity within the state equivalent to the amount of waste it generates. As amended, Section 104(c)(9) of SARA "places the burden of making capacity assurances for future hazardous waste management on the *generating state* and imposes a sanction on that state for failure to satisfy its obligation." *National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Envtl. Mgt.*, 910 F.2d at 721. *See generally Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 783-84; *see also* 132 Cong. Rec. S14,924-25 (daily ed. Oct. 3, 1986) (remarks of Sen. Chafee).

Section 104(c)(9) reflects Congress' desire to ensure that the *national* need for additional and expanded waste facilities is met by assuring that *each* state assumes its fair share of the responsibility for the maintenance and creation of treatment and disposal capacity. Therefore, *as a* minimum requirement, Section 104(c)(9) conditions a state's receipt of Superfund money upon the state providing satisfactory assurance that it will have "capacity" to treat, store and dispose of hazardous waste that is at least equal to the amount of waste that will be generated *within* that state over the next twenty years. 42 U.S.C. § 9604(c)(9)(B); *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 783-85, 794-95.

Thus, Section 104(c)(9) operates as a "counting" device to help solve the NIMBY problems "that arose because of political pressure and public opposition." *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 784. Using its own projected generation of waste as the baseline, each state is assigned proportional responsibility to create enough capacity to meet its share of the *overall national need*. Under this approach, if *each* state assures EPA that it has capacity equal to the amount of waste *projected* to be generated within its borders, there will be sufficient *national* capacity to treat and dispose of all hazardous waste. This does not mean that each state must treat and dispose of its own waste; the market for the use of that capacity is intended to operate freely across state lines. But CERCLA and SARA provide encouragement to license and develop capacity within each state in rough proportion to the amount of waste each state generates.

against North Carolina, a state that has refused to permit the construction of any new facilities. *See South Carolina v. Reilly, Administrator of EPA*, C.A. No. 91-3090 (D.D.C. filed Nov. 25, 1991); *see generally Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 784-85. Under CERCLA—or, more specifically, the 1986 amendments to CERCLA known as SARA—each state must provide a "Capacity Assurance Plan" to EPA projecting the creation of treatment and disposal capacity in proportion to the amount of waste that is generated within the state. The failure to provide such assurances, or subsequently to make good on them, will trigger a cutoff of Superfund monies.

*Third*, any state may continue to seek a cooperative solution to the problems of "inequitable distribution" through the voluntary CERCLA/SARA Regional Agreement process.[22] While such agreements are not enforceable—indeed recalcitrant states can be expelled from a regional agreement as quickly as they are brought in—these regional agreements reflect the cooperative approach fashioned by Congress. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 784-85, 786 n.8.

*Finally*, Alabama can petition Congress, through its delegation, to seek changes to the federal program. Alabama does not presently favor that approach, but only because its own parochial efforts to restrain the import of wastes will not be well-received in the national legislative branch.[23] As shown above, Congress has done much

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[22] Under CERCLA § 104(c)(9)(B), a state may enter into cooperative agreements with other states to satisfy its obligations to provide treatment and disposal capacity equal to its generation of waste. *See generally Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 784-85.

[23] Specifically, as Alabama Governor Hunt has stated in this case:

> The proposed remedy through Congressional action is illusory. Congress has done nothing. Should the decision of the Alabama Supreme Court be set aside, in all probability Congress will continue to do nothing. The votes are simply not there, due to the "NIMBY" syndrome existing in practically every one of the great majority of states which do not have a permitted hazardous waste commercial landfill.

*See* Supplemental Brief of Respondent Hunt in Opposition to Petition for Certiorari at 2 (footnote omitted).



to address the national problem of hazardous waste. While establishing mechanisms and incentives to correct "imbalances" and to assure that each state fulfills its responsibilities it also has provided for the national market to function—without state interference—until that balance is achieved. As the Fourth Circuit has held:

> Unless and until Congress alters the law, the apparent congressional intent of RCRA and SARA would seem to remain—better that hazardous waste be treated and disposed of somewhere, even if spread disproportionately among the states, than that future Superfund sites arise.

945 F.2d at 792.

In sum, any health and safety concerns asserted by Alabama could be addressed by *bona fide* nondiscriminatory regulations establishing health and safety standards. As to Alabama's assertion that it is bearing a disproportionate share of the Nation's hazardous waste burden, this State simply has chosen an improper means—discriminating against interstate commerce—for equalizing that burden by entering into a field reserved exclusively to Congress and the federal regulatory authorities designated by Congress.

## II. THE CIRCUMSTANCES WARRANT A CLEAR RULE THAT WILL PLACE EACH OF THE STATES ON EQUAL FOOTING IN UNDERSTANDING THEIR CONSTITUTIONAL RESPONSIBILITIES UNDER THE COMMERCE CLAUSE

In a "national economy filled with benefits and burdens," *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 792, Alabama seeks to continue to

avail itself of the benefits, but divorce itself from the burdens. Specifically, while Alabama enjoys the benefits of open borders between its sister states by shipping and receiving the products of agriculture and industry that create the hazardous waste, it wants to "stop the flow" of waste generated by industry, agriculture and Superfund cleanup sites in other states which are sent *to* Emelle, Alabama for treatment and disposal.

Although Alabama presumably is not prepared to renounce the benefits of free interstate trade generally, it has not hesitated to exclude the transportation of this article of commerce into the state for safe treatment or disposal. This short-sighted outlook is commonly attributed to what has been called the "NIMBY" syndrome—"not in my backyard." Although the need for safe and efficient hazardous waste treatment and disposal is universally acknowledged, the plain fact of the matter is that most citizens would prefer that the facilities providing those services not be located in their state.

In the state and local political arena, the pressure to enact legislation keeping hazardous waste from some *other* state out of one's *own* state is virtually irresistible. *See, e.g., Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781. Declarations by state officials that they will not allow their home state to become a "dumping ground" for the hazardous waste of other states may indeed arise from a genuine concern; often, however, they reflect as well the most politically expedient course.

The local pressure on state legislators to enact laws that limit the flow of waste into their state is intensified when *other* states have enacted such laws.[24] Because citi-

[24] The $72.00 Additional Fee allows Alabama to "preserve" space at "its" Emelle facility—a privately-owned facility—for the future benefit of *its* own residents. But by preserving Petitioner's facility for Alabama residents, Alabama thus shifts the burden of treating and disposing "imported" hazardous waste to *other* states. These



zens of *other* states, whose goods are barred from the State, do not vote for the state representatives setting forth the discriminatory restriction, it is relatively easy for a local legislative body to pass laws burdening such "out-of-staters."[25] In turn, the only recourse that those "out-of-staters" have (short of the courts) is to their *own* state legislatures to adopt similar exclusionary laws. Thus, there is direct pressure to retaliate against states that will not accept the import of waste.

Given the nature of the issue and its political appeal, it is not surprising that some states have been both persistent and innovative in seeking to implement such bans against the import of waste.[26] So long as any ambiguity in the constitutional limits remains, some states will continue to seek to take advantage of that ambiguity—as Alabama has done here—by directly and unfairly burdening the majority of states that continue to play by the constitutional rules.

Moreover, as the Fourth Circuit recently observed, the efforts of various states to limit the import of out-of-state waste—thereby reducing the available capacity to

other states, in turn, are thereby pressured to enact their own laws, either as retaliation or simply to "protect" themselves (and their citizens and industry) from out-of-state hazardous waste. The immediate result is the balkanization of the national economic union, the very circumstance which compelled the framers to put the Commerce Clause in the Constitution after experiencing the chaos of the Articles of Confederation. *See Healy*, 491 U.S. at 335-37.

[25] Indeed, such laws frequently are designed expressly to coerce other states into changing their policies. This approach was evident in Alabama's earlier blacklist of certain states (which Alabama felt were not living up to their responsibilities), *see National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Envtl. Mgt.*, 910 F.2d at 718, and in South Carolina's similar efforts to restrict the import of waste from North Carolina and other states. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 791-93.

[26] Thus, Alabama resorted to a tax only after its other efforts to limit the flow of commerce were rejected by the federal courts.

*safely* dispose of the waste—could have the immediate effect of causing some industries and citizens to return to the dark days of dumping waste illegally. *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 792. As such, *more* "Superfund" dumping sites may arise across the Nation if Alabama, and states following Alabama's lead, are allowed to remove regulated disposal capacity from the national marketplace, frustrating the national health and safety goals of the federal regultory scheme. *Id.* Indeed, the Fourth Circuit admonished that "the effect of every state designing particular limits and bars for out-of-state waste could be catastrophic." *Id.*

Thus, this case not only calls for reversal, but for a clear reaffirmation of the principles requiring reversal so as to put to rest the temptation on the part of many states to succumb to the NIMBY syndrome and enact similar discriminatory laws.

## CONCLUSION

The decision of the Alabama Supreme Court should be reversed.

Respectfully submitted,

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March 12, 1992